No. 98-722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL L. DAVIS,

Petitioner,

vs.

JOHN ZIRKELBACH; RICHARD WHITLOW; MARVIN GUEST, SR., as Chief of Police for the City of Evansville, Indiana; THE CITY OF EVANSVILLE, INDIANA, CHRISTIAN M. LENN; JONATHAN J. PARKHURST; and STANLEY M. LEVCO, as Prosecuting Attorney for Vanderburgh County, Indiana,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JOHN ZIRKELBACH, RICHARD WHITLOW, MARVIN GUEST, SR., AS CHIEF OF POLICE FOR THE CITY OF EVANSVILLE, INDIANA AND CITY OF EVANSVILLE, INDIANA

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QUESTIONS PRESENTED

I. Did the Circuit Court correctly hold that Petitioner's claims against the police officers and City are barred by the statute of limitations under the Federal Wiretap Act, 18 U.S.C. § 2520(e)?

II. Did the Circuit Court correctly hold that the police officers were protected by the "extraordinary circumstances" exception to the lack of qualified immunity?

III. Did the Circuit Court correctly hold that Petitioner failed to establish "deliberate indifference" exception to the general rule against respondeat superior liability for municipalities in 42 U.S.C. § 1983 actions?

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Other Authority:

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STATEMENT OF THE CASE

Prior to May 1990, neither Police Officer Richard Whitlow (hereinafter "Officer Whitlow") nor Police Officer John Zirkelbach (hereinafter "Officer Zirkelbach") had any knowledge, relationship, or acquaintance with Michael May (hereinafter "May"); Petitioner, Michael Davis (hereinafter "Davis"); or Jeannette Duncan (hereinafter "Duncan").

In the first week of May 1990, Evansville Patrol Officer Steve Green advised Officer Whitlow (a narcotics officer with the Evansville Police Department) that he had been approached by a man named May, who believed one of his employees was involved with narcotics, and that May wanted to speak to a narcotics officer.

Officer Whitlow met with May and was told by May that he owned a business called "Mike's Used Cars." May told Officer Whitlow that he had been told by several people that one of his employees, Davis, was a drug dealer. Some of the things that he had observed involving Davis led him to suspect that this information was true. May told Officer Whitlow that he wiretapped his business telephone to make sure there wasn't illegal activity going on from his place of business. Other than what May told him, Officer Whitlow had no other information concerning the alleged wiretap, the audiotape recording of the alleged wiretap, or the business relationship between May and Davis. May did not give Officer Whitlow any specific information about tapping his phone or making the audiotape. May played the audiotape of the alleged wiretap phone conversation between persons he identified as Davis and Duncan for Officer Whitlow. May had taped the alleged telephone conversation prior to contacting the Evansville Police Department. After listening to the audiotape played by May, Officer Whitlow asked May if he could have the audiotape,

and May told Officer Whitlow he wanted to keep it "to protect himself". Officer Whitlow then advised May that he would need to check with his superiors about how to handle this situation.

Officer Whitlow had been previously involved with taped telephone conversations where one of the two parties had knowledge of the interception of the conversation, but had never been involved in a situation where the parties on the telephone had no knowledge of the taping. Officer Whitlow realized from the beginning that this was a new situation that he had not dealt with before, and wanted to get legal advice before proceeding further. He was not certain whether the Police Department could lawfully use the audiotape in any criminal investigation.

Officer Whitlow initially spoke with his fellow narcotics officer, Officer Zirkelbach, about the situation. Officer Whitlow then went to his immediate supervisor of the Narcotics Division, Lt. Patti Dee Wazny ("Lt. Wazny"). Lt. Wazny advised Officer Whitlow that she was not sure that the audiotape or any of the information could be utilized by the Evansville Police Department. Lt. Wazny was the ranking officer in the Narcotics Division of the Evansville Police Department from June 1988 to February 1993. It was the policy and practice of the Narcotics Division of the Evansville Police Department to follow federal guidelines pertaining to the use of wiretaps. At no time did the Evansville Police Department have any equipment for wiretapping or wire interceptions. The only times that the Evansville Police Department utilized wiretaps were in joint investigations with either the Indiana State Police or the Federal Drug Enforcement Administration. Lt. Wazny advised Officer Whitlow that he should seek the legal opinion of the Prosecutors assigned to the Drug Law Enforcement Program ("DLEP") for legal advice on the use of the audiotape and information received from May. The DLEP was a special program in which designated Deputy Prosecutors were assigned to work with the

Narcotics Division of the Evansville Police Department in the investigation and prosecution of drug cases.

Officer Whitlow telephoned Deputy Prosecutor Christian Lenn ("Deputy Prosecutor Lenn"), who was in the DLEP at his office, and advised him of the circumstances of the audiotape and what was on the audiotape, and sought his legal advice concerning possible use of the audiotape. Deputy Prosecutor Lenn told Officer Whitlow and Lt. Wazny that since the Police Department had not initiated or been involved with the telephone tap and had no prior knowledge of it, and that May had done this on his own and had brought the information to the Police Department, and that the Police Department was just using information from another individual, he felt it could lawfully be used by the police officers. Deputy Prosecutor Lenn then advised Lt. Wazny and Officer Whitlow that the applicable law was such that a business owner could intercept or record conversation on his or her own business telephone. Deputy Prosecutor Lenn told Officer Whitlow and Lt. Wazny that he felt that the audiotape could be used to "flip" the female suspect, Duncan, to become a police informant. But for the advice of Deputy Prosecutor Lenn, Officers Zirkelbach and Whitlow would not have undertaken any action to use the contents of the audiotape against Davis. Officer Whitlow was uncertain as to the legalities involved in the utilization of the audiotape, and would not have acted but for the assurance from Deputy Prosecutor Lenn that it was lawful to act with respect to the said audiotape.

Officer Zirkelbach was advised by Officer Whitlow that Deputy Prosecutor Lenn had given him legal advice that they could proceed with the investigation of Davis based upon the information received from the audiotape which Officer Whitlow received from May. After receiving the legal opinion from Deputy Prosecutor Lenn, Officer Whitlow returned to the bar

where May worked and asked May if he could have the audiotape so that he could make a copy of it. Officer Whitlow made a copy of the audiotape and took the original back to May. Officer Whitlow gave a copy of the audiotape to Officer Zirkelbach, after returning the original to May. Officer Zirkelbach contacted Duncan and advised her that they possessed an audiotape recording of a telephone conversation between Davis and Duncan in which incriminating statements were made. Duncan thereafter cooperated in effectuating an arrest of Davis.

On May 11, 1990, Davis was arrested for violations of state controlled substance statutes. After Davis was formally arraigned and released on bond, Duncan appeared at Davis's place of business on May 21, 1990, and disclosed her reasons for serving as a confidential informant. Duncan was crying, and disclosed to Davis that she had not acted voluntarily. Duncan then and there disclosed to Davis that an Evansville police officer had appeared at her work place and claimed to have an audiotape recording of a conversation between Duncan and Davis. Duncan disclosed to Davis that the police officer revealed that the audiotape recording was of a conversation in which Duncan and Davis discussed possessing or otherwise dealing five pounds of marijuana. Duncan also revealed that the audiotape recording contained a conversation in which Davis and Duncan discussed having sexual intercourse or a "nooner".

Davis acknowledged in deposition that he only had one (1) conversation, in his life, with Duncan regarding five (5) pounds of marijuana and any type of sexual relationship and this conversation occurred over the telephone while Davis was at his place of employment and Duncan was at her place of employment.

On July 19, 1990, Davis registered complaints about Officer Zirkelbach, Officer Whitlow, and other police officers to the Evansville Police Department. Among the complaints made by Davis to Lt. Wazny on July 19, 1990, was a specific complaint about a telephone wiretap recording between Davis and Duncan which was done by May.

On September 9, 1992, Davis filed his Complaint in the United States District Court against the Respondents and others seeking relief under the Federal Wiretap Act, and under 42 U.S.C. § 1983. Davis's Complaint was filed more than two (2) years after Duncan had disclosed to Davis the existence of the audiotape recording of their only conversation regarding drugs and sex.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT DAVIS'S CLAIMS ARE BARRED BY THE ACCRUAL OF THE STATUTE OF LIMITATIONS UNDER THE FEDERAL WIRETAP ACT.

The Seventh Circuit's opinion correctly held that Davis filed his Federal Wiretap action beyond the two (2) year bar of 18 U.S.C. § 2520(e). (App. 7a-8a). More specifically, the Seventh Circuit found that Davis had to bring his claim under the Federal Wiretap Act within two (2) years of the time when he had "a reasonable opportunity to discover the violation". 18 U.S.C. § 2520(e). (App. 7a). Under Section 2520(e) of the Federal Wiretap Act, Davis was not required to have actual knowledge of a violation, only a "reasonable opportunity to discover."

The Statement of the Case contained in the Petition for Writ of Certiorari misstates certain key facts and omits other facts which are crucial to the Seventh Circuit's opinion. (Pet. 1). Davis specifically had reason to know that his telephone conversation with Duncan had been intercepted and audiotape recorded. Duncan appeared at Davis's place of business on May 21, 1990 and disclosed to Davis why she had acted as a confidential informant leading to his arrest on drug charges. Duncan disclosed to Davis that Officer Zirkelbach had appeared at her work place and claimed to have an audiotape recording of the conversation between Duncan and Davis. Duncan told Davis that Officer Zirkelbach revealed that the audiotape recording was of a conversation in which Duncan and Davis discussed possessing or otherwise dealing five (5) pounds of marijuana, and also referred to a portion of conversation which Davis and Duncan discussed having a "nooner" or sexual intercourse. Davis testified in deposition that he only had one (1) conversation in his life with Duncan regarding five (5) pounds of marijuana and engaging in any type of sexual relationship, and that single conversation occurred over the telephone while Davis was at his place of employment and Duncan was at her place of employment. Because Davis and Duncan were in separate locations, this conversation could only have been tape recorded from the telephone. Davis later complained to Lt. Wazny of the Evansville Police Department on July 19, 1990 about a telephone wiretap of the conversation between himself and Duncan, which was done by May and provided to narcotics officers.

Davis filed his Complaint in the United States District Court against the Respondents and others seeking relief under the Federal Wiretap Act, 18 U.S.C. § 2520 and 42 U.S.C. § 1983 on September 9, 1992. Davis's Complaint was filed more than two (2) years after Duncan had disclosed on May 21, 1990 to Davis the existence of the audiotape recording of their only conversation regarding drugs and sex.

II.

THE CIRCUIT COURT CORRECTLY HELD THAT THE POLICE OFFICERS WERE PROTECTED BY THE "EXTRAORDINARY CIRCUMSTANCES" EXCEPTION TO THE LACK OF QUALIFIED IMMUNITY.

The Seventh Circuit upheld the District Court's finding that, although Officer Zirkelbach's and Officer Whitlow's use of the audiotape was a clear violation of established law, the officers were protected by the "extraordinary circumstances" exception to the lack of immunity that was first identified in *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). (App. 10a).

Davis places unfounded reliance on the erroneous decision of the District of Columbia Circuit in *Berry v. Funk*, to the effect that the qualified immunity doctrine applied to constitutional torts and § 1983 actions has no application to a Federal Wiretap claim. 146 F.3d 1003, 1013 (D.C. Cir. 1998). This Court has never adopted the reasoning in *Berry v. Funk* that a qualified immunity defense is not applicable to a statutory claim. To the contrary, the Court in *Harlow v. Fitzgerald* in analyzing the scope of the defense from its prior decision in *Gomez v. Toledo*, 446 U.S. 635, 640 (1990) observed that

> Although Gomez presented the question in the context of an action under 42 U.S.C. § 1983, the Court's analysis indicates that "immunity" must also be pleaded as a defense and actions under the constitution and laws of the United States.

457 U.S. 800, 815 at n.24. In *Davis v. Scherer*, the Court also observed that:

> For the reasons that we discuss, officials sued for violations of rights conferred by a statute or regulation, like officials sued for violation of

> constitutional rights, do not forfeit their immunity by violating some other statute or regulation. Rather, these officials become liable for damages only to the extent there is a clear violation of the statutory rights that give rise to the cause of action for damages.

408 U.S. 183, 194 at n.12 (1984). This Court has consistently held that qualified immunity applies to claims for violation of statutes, as well as constitutional rights without regard to the existence of statutory defenses.

The only real conflict concerning qualified immunity lies among decisions of the District of Columbia Circuit. The opinion in *Berry v. Funk* conflicts with prior decisions in which qualified immunity from liability for damages was granted under Title III of the Omnibus Crime Control and State Streets Acts of 1968 for illegal wiretaps. *See Halperin v. Kissinger*, 1991 WL 120167 (D.D.C.) and *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975). Contrary to Davis's assertion, the doctrine of qualified immunity is not strictly a common law defense limited to common law claims. As this Court observed in *Anderson v. Creighton*:

> Although it is true that we have observed that our determinations as to the scope of official immunity are made in the light of the "common law tradition" (FN5) (*Malley v. Briggs*, 475 U.S. 335, 342 (1986)), we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law. That notion is plainly contradicted by *Harlow*, where the Court completely reformulated qualified immunity along principles not at all embodied in the common law, replacing the inquiry into subjective malice so frequently required at common

> law with an objective inquiry in the legal reasonableness of official action.

483 U.S. 635, 644 (1987).

The Seventh Circuit in this case upheld the District Court's finding that the "extraordinary circumstances" exception to the lack of immunity that was first identified in *Harlow*, 457 U.S at 819, applied to the facts of this case. Davis misconstrues the Seventh Circuit's opinion in referring to the "four factors" mentioned in *V-1 Oil Co. v. Wyoming*, 902 F.2d 482 (10 Cir. 1990). "The opinion treats these four factors as the exclusive factors for consideration in applying the exception in cases involving reliance on legal advice." (Pet. 11). However, as this Court in *Harlow* explained:

> if the official pleading the defense claims extraordinary circumstances that can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

457 U.S. at 819. Contrary to the assertion of Davis's counsel, the opinion of the Seventh Circuit neither refers to nor suggests "exclusive factors," but merely mentions "relevant factors," including

> how unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the legal advice was, whether complete information had been provided to the advising attorney(s), the prominence and competence of the attorney(s), and how soon after the advice was received the disputed action was taken.

(App. 11a). The Seventh Circuit found that the relevant factors enumerated supported the District Court's decision to grant qualified immunity to Officers Zirkelbach and Whitlow under the facts of this case. (App. 11a). The factors supporting the District Court's decision to grant qualified immunity to Officers Zirkelbach and Whitlow were applied to the following facts: the officers went to Lenn, the Deputy Prosecutor specifically responsible for giving advice to the narcotics division in the police force; Lenn gave precise advice to them about the way the audiotape recording could be used; the legal advice given to them took into the account the circumstances of how the audiotape recording had been made, who had been responsible for the intercept, and how the police had received it; Lenn imposed limits on the officers' use of the audiotape, permitting them to only use it to convince Duncan to cooperate, but not directly use the audiotape; the officers followed the legal advice strictly; they acted promptly after receiving the legal advice; and they had no reason to believe that Lenn's advice was erroneous. (App. 11a-12a). The factors enumerated and applied to the situation involving Officers Zirkelbach and Whitlow clearly fall within the extraordinary circumstances contemplated in *Harlow*, 457 U.S. at 819.

III.

THE CIRCUIT COURT CORRECTLY HELD THERE WAS NO RESPONDEAT SUPERIOR LIABILITY.

Davis complains that the opinion of the Seventh Circuit "briefly concludes with no significant discussion" regarding his claim for respondeat superior liability under § 1983 against Chief of Police Gann and the City of Evansville. (Pet. 15). The Seventh Circuit noted in its opinion that "we can dispose quickly of Davis's claims against Chief of Police Gann." (App. 9a). The Circuit Court concluded that Davis made no showing that

Chief of Police Gann had any knowledge about the particular incident, and therefore could not show that Chief of Police Gann intentionally violated Davis's constitutional rights. (App. 9a).

With respect to the claims against the City of Evansville, the Circuit Court found that Davis had failed to make any allegation in the record which would suggest that the City of Evansville had a policy or practice of unlawfully using intercepted communication in violation of either the Federal Wiretap Act or the Indiana Wiretap Act. (App. 13a). Under this Court's decisions in *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997), the § 1983 claim of Davis must fail.

Davis makes a desperate attempt to save the respondeat superior claim by alleging that the ranking officer in narcotics, Lt. Wazny, had prior knowledge of the use of the audiotape. (Pet. 15). Davis fails to mention the fact that it was Lt. Wazny who referred Officer Whitlow to Deputy Prosecutor Lenn to determine whether the audiotape could be legally utilized. She had no prior knowledge or experience concerning the legality of the audiotape under the circumstances presented to her. These circumstances do not constitute "deliberate indifference" which would constitute a "policy" or "custom" for purposes of § 1983 liability. *See Canton v. Harris*, 489 U.S. 378, 388-90 (1989).

CONCLUSION

The Seventh Circuit Court of Appeals correctly held that Davis's claim against the police officers and the City of Evansville under the Federal Wiretap Act was barred because he failed to commence the action within two (2) years of the time when he had "a reasonable opportunity to discover the violation". 18 U.S.C. § 2520(e). Davis's § 1983 claim is derivative of his wiretap act claim. The statute of limitations applicable under Indiana law to § 1983 claims is also two (2) years. Relevant factors analysis established that the police officers were entitled to qualified immunity under the "extraordinary circumstances" exception of *Harlow v. Fitzgerald*. The Petitioner wholly failed to demonstrate any basis for finding "deliberate indifference" on the part of the Chief of Police or the City of Evansville, which would establish a "policy" or "custom" for purposes of § 1983 liability.

This case does not merit further review, and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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